IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

REVIEW PETITION (CIVIL) NO. OF 2023

IN

WRIT PETITION (CIVIL) NO. 1142 OF 2022

IN THE MATTER OF:

Utkarsh Saxena and Anr. **… Petitioners**

Versus

Union of India **… Respondent**

AND WITH

I. A. No. _____ of 2023

An application for exemption from filing certified copy of the impugned judgment & order.

AND WITH

I. A. No. _____ of 2023

An application for exemption from filing notarized affidavits.

PAPER BOOK

(KINDLY SEE INDEX INSIDE)

ADVOCATE FOR THE PETITIONERS: **SHADAN FARASAT**

SYNOPSIS

Petitioners file this Review Petition against the judgement of a Constitution Bench of this Hon'ble Court, dated 17.10.2023, in Writ Petition No. 1011/2022 (*Supriyo @ Supriyo Chakraborty and Anr. vs Union of India*), and in a batch of connected matters, including the Writ Petition No. 1142/2022 (*Utkarsh Saxena and Anr. vs Union of India*). Through this judgement, this Hon'ble Court dismissed the Petitioners' writ petition, which challenged the discriminatory exclusion of queer couples from the ambit of the Special Marriage Act, 1954 [SMA], and asked for a recognition of the Petitioners' right to marry, on equal terms with heterosexual couples, under the SMA.

Petitioners respectfully submit that the majority opinion, authored by Bhat J. ["**the majority opinion**"], suffers from several errors on the face of the record. These are:

a. The majority opinion mis-characterises the Petitioners' case as being about a freestanding "fundamental right to marry," instead of a challenge to the discriminatory exclusion of queer couples from an existing, secular *legal regime* of marriage. The majority opinion thus answers a question that was never asked (whether there exists an abstract "right to marry"), and fails to answer the question that *was* asked (whether queer couples can be *excluded* from a legal regime purely on the basis of their sexual orientation).

b. The majority opinion therefore mis-characterises the Petitioners' claim as asking for the creation of a "new social/legal status," instead of a claim asking for access, on equal and non-discriminatory terms, to an *existing* legal

status. It thus declines a relief that was never sought (a "new" legal regime), and fails to address itself to the relief that *was* sought (equality).

c. The majority opinion's reasoning is evidently unsustainable, as its logic would place anti-miscegenation laws and laws banning inter-caste or inter-faith marriages outside the pale of constitutional scrutiny.

d. The majority opinion contradicts itself by first using the "intent" of the legislators of the SMA to test whether or not the law is discriminatory, and subsequently admitting that the correct test is that of "effect."

e. The majority opinion *concedes* that the effect of the SMA's exclusionary provisions is unconstitutionally discriminatory, but leaves the *remedy* at the discretion of an executive committee, on the basis that its resolution is too legally complex for judicial declaration or interpretation. It is respectfully submitted that *once* a Court finds that a statute is unconstitutionally discriminatory, it cannot then *delegate* the task of remedying discrimination to the executive.

f. In any event, the task of *re-interpretation* - which is all that the Petitioners ask this Hon'ble Court to do, with respect to certain provisions of the SMA - is not beyond its capacities. The gender-neutral reading of certain provisions of the SMA is well within the ambit of not only the previous practice of *this* Hon'ble Court, but of constitutional courts worldwide.

g. The majority opinion compounds its errors by refusing to recognise queer couples' right to adopt, on the basis that such right is available only to married couples, and there is an

intelligible differentia between married and unmarried couples when it comes to adoption.

Above all else, it is respectfully submitted that by refusing to grant queer couples access, on equal terms, to one of the most significant social institutions in our society - both intrinsically, and as a gateway to other crucial rights - the Court resiles from the promises of equal moral membership that it made to queer individuals in **Navtej Johar vs Union of India**, and entrenches once again a doctrine of "separate and unequal."

Hence, the present Review Petition.

LIST OF DATES AND EVENTS

Date	Event
1954	The Special Marriage Act, 1954, is enacted. It is intended to be a *secular* legislation, for individuals who cannot, or do not wish to, get married under personal laws.
1969	The Foreign Marriage Act is enacted, for the purposes of marriages solemnised outside India.
24.8.2017	In **Justice K.S. Puttaswamy vs Union of India**, this Hon'ble Court declares that the right to privacy is a fundamental right under the Indian Constitution. The right to privacy is held to include the right to decisional autonomy, and intimate decision-making.
6.9.2018	In **Navtej Johar vs Union of India**, this

	Hon'ble Court reads down section 377 of the Indian Penal Code, so as to decriminalise same-sex relationships between consenting adults.
2020-2021	In the wake of the judgment of this Hon'ble Court in **Navtej Johar vs Union of India**, petitions are filed in the Hon'ble High Courts of Kerala and Dehi, seeking recognition of same-sex marriage under the SMA.
25.11.2022	In Supriyo @ Supriya Chakraborty vs Union of India, this Hon'ble Court issues notice on a plea for the recognition of same-sex marriages under the SMA.
06.01.2023	Notice is issued on a batch of petitions, including the present Petitioners'.
April-May 2023	A Constitution Bench of this Hon'ble Court hears arguments in the matter.
17.10.2023	By a majority, this Hon'ble Court dismisses the writ petitions, and declines to grant relief.
20.11.2023	Hence, the present review petition.

IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

REVIEW PETITION (CIVIL) NO. _____ OF 2023

IN

WRIT PETITION (CIVIL) NO. 1142 OF 2022

IN THE MATTER OF:

Position of Parties	**In W. P. C. No. 1142 of 2022**	**In Present Review Petition**
1. Utkarsh Saxena, [redacted]	**Petitioner No. 1**	**Petitioner No. 1**
2. Ananya Kotia, [redacted]	**Petitioner No. 2**	**Petitioner No. 2**

VERSUS

Union of India, Ministry of Law & Justice, through its Secretary, 4th Floor, A-Wing, Shastri Bhawan, New Delhi – 110001	**Respondent**	**Respondent**

REVIEW PETITION UNDER ARTICLE 137 OF THE CONSTITUTION OF INDIA, READ WITH ORDER XLVII OF THE SUPREME COURT RULES, 2013, AGAINST THE JUDGEMENT DATED 17.10.2023 IN WRIT PETITIION (CIVIL) NO. 1011/2022 AND CONNECTED MATTERS, INCLUDING WRIT PETITION (CIVIL) NO. 1142/2022, TITLED *UTKARSH SAXENA AND ANR VERSUS UNION OF INDIA* WITH SUPPORTING AFFIDAVIT.

TO,

HON'BLE THE CHIEF JUSTICE OF INDIA

AND HIS COMPANION JUSTICES OF THE

HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE

PETITIONER ABOVE NAMED

MOST RESPECTFULLY SHOWETH:

1. The Petitioners have filed this Review Petition under Article 137 of the Constitution of India read with Order XLVII of the Supreme Court Rules 2013 against the impugned Judgement dated 17.10.2023, passed by the Hon'ble Constitution Bench of this Hon'ble Court in the case of *Supriyo @ Supriyo Chakraborty and Anr. vs Union of India*, Writ Petition (Civil) No. 1011/2022 and connected matters, including Writ Petition (Civil) No. 1142/2022, titled *Utkarsh Saxena and Anr. vs Union of India*.

2. This Hon'ble Court, *vide* its impugned judgement dated 17.10.2023, by a majority, dismissed the batch of petitions filed by the Petitioners ["**the majority opinion**"]. In effect, this Hon'ble Court has declined the petitioners' plea for the

recognition of same-sex marriages under the Special Marriage Act.

3. It is respectfully submitted that the impugned judgement suffers from numerous errors on the face of the record, commits factual mistakes, misinterprets settled jurisprudence on fundamental rights, and mis-characterises the case of the Petitioners in several critical respects. Its effect is to turn back the clock on fundamental rights review (in violation of the principle of non-retrogression), in ignorance of several previous binding judgments of this very Court. Its effect, also, is to deny to queer couples equal moral membership within society, by validating a legally-sanctioned denial of access to one of the most important and fundamental of social institutions: the institution of marriage.

4. Petitioners have, consequently, invoked the review jurisdiction of this Hon'ble Court.

GROUNDS

The impugned judgement suffers from various errors apparent on the face of the record, which are set out below, and are taken in the alternative, without prejudice to each other.

On Discrimination and the "Right to Marry"

A. BECAUSE the majority opinion holds that there is no "fundamental right to marry," on the basis that:

a. Marriage an an institution is "prior to the State"; marital status is not "conferred by the State"; and that the "marriage structure" exists, "regardless of the State." [**Majority opinion, paragraph 45**].

b. Consequently, when the Petitioners claim a "fundamental right to marry," in essence, they ask the State to "create social or legal status." [**Majority opinion, paragraph 46**].

c. The Court cannot compel the State to create such an institution [**Majority opinion, paragraph 47**], as such a result can be achieved only through an "enacted law" [**Majority opinion, paragraph 49**].

d. Consequently - and reasoning backwards from this conclusion - there is no fundamental right to marry.

B. It is respectfully submitted that not only does this argument turn constitutional analysis on its head (reasoning backwards from a conclusion of non-enforceability to justify the non-existence of the right itself), it fundamentally mis-characterises the Petitioners' case.

C. The Petitioners do not ask this Court to compel the State to "create a social or legal status" out of whole cloth. The Petitioners submit, instead:

a. The institution of marriage already *exists* as a "social and legal status." As submitted in the Petitioners' writ petition (and indeed, as was conceded by the State), because of the important - indeed, foundational - space that it occupies in our society, the institution of marriage has both an intrinsic significance, as well as an instrumental significance.

i. Its intrinsic significance lies in how the ability to access the institution of marriage is an important

marker of equal moral membership of the community, and the fundamental right to dignity.

ii. Its instrumental significance lies in how it functions as a *gateway* to other crucial rights (the right to a family life, and various other economic and social rights, spelt out in the accompanying writ petition).

b. What the Petitioners therefore challenge is the *legally-mandated exclusion of queer couples* from the institution of marriage. Petitioners submit that this exclusion from accessing *an already existing institution*, purely on the basis of ascriptive characteristics (in this case, sexual orientation) is discriminatory, and a violation of the rights to life and dignity.

c. The majority opinion, thus, gets it exactly backward: far from asking the Court to direct the State to "create" a social or legal status, the Petitioners ask the Court to *remove an exclusionary barrier* that prevents them from *accessing* this status, on equal terms with the rest of society.

D. That the majority opinion's reasoning is unacceptable is evident from a straightforward hypothetical: consider anti-miscegenation laws (i.e., laws that prohibited white and black people from marrying each other), which were popular in the United States, until they were struck down in **Loving vs Virginia 388 U.S. 1 (1967).** Alternatively, consider a hypothetical legislation that bans inter-caste marriages. On the majority's reasoning, an inter-race or inter-caste couple

approaching this Court against such a law would have no case, as - in essence - they would be asking for the "creation of a social or legal status."

E. It is respectfully submitted that this Court would never countenance an anti-miscegenation law, or a law banning inter-caste marriages. It would be correct not to countenance such a law. But it is also submitted that since it has been accepted that sexual orientation is a prohibited ground of discrimination under Article 15(1) - just like caste and race - *there is no distinction between an anti-miscegenation law and a law excluding queer couples, solely on the basis of their sexual orientation*.

F. The fundamental flaw in the majority opinion, therefore, lies in its artificial separation of the *right to marry* from the *right against discrimination*. In holding that there is no free-standing, acontextual "right to marry," the majority erects a strawman, and then knocks it down. The *actual* claim before the Court, however, is of a *right to marry on equal terms with the rest of society*; it is a *right not to be discriminated against in access to marriage*; a right that is of particular importance because, as has been noted above, there is a range of other fundamental rights that are inextricably bound up with the ability to access the institution of marriage.

G. The incoherence of the majority's reasoning can be illustrated through another example. Consider the law of contract. The social institution of contract is exactly akin to how the majority characterises the social institution of marriage. In its bare sense - a mutual exchange of promises - the concept of

the contract indubitably exists "prior to the State." "Contractual status" is not "conferred by the State," and the "contract structure" (sic) exists "regardless of the State."

H. Now consider a law that deprives women of the right to contract, on the basis of gendered assumptions and stereotypes. One does not have to look too far back into history before one reaches the common law regime of "coverture," which was based upon the exclusion of women from the "institution of contract."

I. On the majority's reasoning, if someone were to approach this Court and challenge this hypothetical law of contract, they would not be entitled to any relief. The majority would hold that the "social institution of contract" exists prior to the State, that there is no "fundamental right to contract", and that therefore the Court cannot "compel" the State to "create a social or legal status" allowing women to enter into contracts. The majority would hold - as it does in **paragraph 55** - that its hands are tied, because to grant any relief would amount to placing a "positive obligation" on both the State and private parties; or - as it holds in **paragraph 62** - it would amount to "mandating a horizontally applicable parliamentary law or legal regime."

J. It is submitted with the greatest of respect that this Court would never actually hold so, and for good reason: this Court would understand that what is at stake is the *legally sanctioned discriminatory exclusion from accessing a social institution, participation in which is an essential marker of equal moral membership in the community; and a form of*

discrimination that is founded on ascriptive characteristics explicitly prohibited by Article 15(1) of the Constitution. This Court would either strike down such a discriminatory law, or - if it was the *only* contract law in existence, and the result of a strike down would be legislative vacuum - it would *interpret* the words of the law in gender neutral terms. It would certainly not uphold a regime of contract law where women were not permitted to enter into contracts.

K. It is respectfully submitted, therefore, that the conceptual pillars that uphold the majority's opinion crumble upon further scrutiny; these are errors of first principle, and are evident on the face of the record. They merit intervention by this Court, in exercise of its review jurisdiction.

<u>On the Special Marriage Act</u>

L. The majority opinion's analysis of the Special Marriage Act suffers from a fundamental misunderstanding of established jurisprudence under Article 14, and numerous errors on the face of the record.

M. *First*, the majority opinion holds that the exclusion of same-sex couples from the ambit of the Special Marriage Act is an instance of "under-classification" (**paragraph 77**), and therefore not *per se* discriminatory. The majority opinion fails to account for the fact that when the exclusion is based on *ascriptive characteristics* (especially those spelt out under Article 15(1)), then the case is no longer one of "under-classification", but of *outright* discrimination, which is *per se* prohibited under the Constitution.

N. The majority then holds that a perusal of the Statement of Objects and Reasons of the SMA reveals that its objective was to provide a legal avenue for marriage for heterosexual couples "belonging to different faiths", and that there was no "idea to exclude non-heterosexual couples", as at the time, section 377 of the Indian Penal Code criminalised same-sex relations (**paragraph 82**).

O. It is respectfully submitted that at the outset, the majority opinion falls into a crucial factual error: the SMA is *not* limited to couples "belonging to different faiths." The SMA is open to *all* couples who do not wish to avail of their respective *personal laws* in order to get married. The majority's error is not innocuous because - as the Petitioners submitted - the design of the SMA is evidently to provide an avenue for marriage *outside* of religious law - that is, secular marriage, which - therefore - is *agnostic* towards ascriptive characteristics. As Petitioners submitted, therefore, a gender-neutral reading of the SMA *advances* its purpose, and is *consistent* with its underlying thrust.

P. *Secondly*, the majority commits a fundamental error in holding that because the "idea" of the drafters was "not to exclude" non-heterosexual couples, it therefore follows that the SMA is constitutionally valid. This error operates at multiple levels.

a. *First*, it has been established beyond cavil that in testing the constitutionality of a statute, it is not its "object" or "intention" (much less its "idea") that matters, but its *effect*. Petitioners will not fill up needless space by citing

the catena of judgments on this proposition. In fact, the majority opinion accepts and endorses this proposition in a separate section (discussed in greater detail below).

b. *Secondly*, even if the majority's focus on the "idea" behind the SMA is to be taken at face value, it has *also* been established beyond cavil that when a constitutional court renders a judgement of unconstitutionality, the statute in question is unconstitutional *from the day it was enacted*. Consequently, when - in **Navtej Johar** - this Court held that Section 377 of the IPC was unconstitutional to the extent that it criminalised consensual same-sex relations, section 377 stood unconstitutional *from the day of its enactment* (or, at the very least, from the day the Constitution of India came into force). Therefore, the "hostile classification" inherent in excluding queer couples from the scope of the SMA does not become innocuous simply because *at the time* it was legally valid to discriminate against queer people.

i. The majority's logic can once again be tested through a hypothetical. Assume that there is a society with a legal regime of slavery based on ethnicity; and because those who have been enslaved cannot legally enter into contracts, the law of contract also excludes such individuals.

ii. Let us now imagine that slavery is held unconstitutional, and abolished. The discriminatory law of contract is then challenged.

The majority would hold that the discrimination is valid, because *at the time the contract law was drafted*, the drafters had no "idea" that slaves would, one day in the future, count as free and equal people.

iii. It is respectfully submitted that this Court would never hold so, and that there is no conceptual distinction between the hypothetical just cited, and the present case: it is patently absurd to justify the hostile classification under the SMA on the basis that *at the time it was enacted*, queer people were subjected to a legally-sanctioned regime of discrimination and criminalisation.

Q. The majority then argues that even after **Navtej Johar**, the objective of the law remains valid, as it is to facilitate inter-faith marriages (**paragraph 85**). As pointed out above, this is a manifest error on the face of the record, as the objective was demonstrably *not* to merely facilitate inter-faith marriages.

R. Furthermore, this analysis falls apart on its own terms. Let us come back to our hypothetical contract law. Let us suppose that this contract law came into existence *after* the abolition of slavery, but *before* the emancipation of women from the regime of coverture. Consequently, for the first time, it allows the previously enslaved people to contract, but not women. Now this law is challenged. The majority would hold that the law is constitutional because it "facilitates" the right to contract of the previously enslaved individuals, and that *this* objective "is as valid today as it was at the time of the birthing

of the law." (**paragraph 85**) It is respectfully submitted that this Court would never hold so. However, this is precisely what the majority commits this Court to holding.

S. The majority judgement also deploys this stated legislative purpose of providing a route to marriage for "inter-faith couples" as a justification for refusing to *reinterpret* the relevant provisions of the SMA in a gender-neutral manner. For the reasons stated above, this is factually incorrect, and an error on the face of the record (**paragraph 99**).

T. The majority further argues that a gender-neutral reading would have negative effects on the rights of women, as protected under the SMA, and that reading only *some* of the provisions in a gender-neutral way is impermissible. It is respectfully submitted that the majority opinion ignores the fact that a gender neutral reading is required in order to *bring certain discriminatory provisions of the SMA in line with constitutional principles, and as an alternative to striking them down as unconstitutional*. Where a provision under the SMA is gendered *because* its goal is to protect the rights of women within a marriage, for reasons of structural vulnerability, there is no question of unconstitutionality, and therefore no question of striking down or re-interpretation.

Remedies

U. It is respectfully submitted that the majority opinion commits an error on the face of the record in *conceding* that the effect of the SMA is unconstitutional discrimination, but *delegating* the remedy to the Executive. In **paragraph 113,** the majority judgement notes:

> *It is important to recognize, that while the state ipso facto may have no role in the choice of two free willed individuals to marry, its characterizing marriage for various collateral and intersectional purposes, as a permanent and binding legal relationship, recognized as such between heterosexual couples only (and no others) impacts queer couples adversely. The intention of the state, in framing the regulations or laws, is to confer on benefits to families, or individuals, who are married. This has the result of adversely impacting to exclude queer couples. By recognizing heterosexual couples' unions and cohabitation as marriages in various laws and regulations such as: in employment (nominations in pension, provident fund, gratuity, life and personal accident insurance policies); for credit (particularly joint loans to both spouses, based on their total earning capacity); for purposes of receiving compensation in the event of fatal accidents, to name some such instances, and not providing for non-heterosexual couples such recognition, results in their exclusion.*

V. In **paragraphs 114 - 117**, the majority opinion spells out further discriminatory impacts of the denial of access to the marital institution for queer couples.

W. It is respectfully submitted that there is nothing in our law or jurisprudence that authorises a Court to *both* hold that there is unconstitutional discrimination, *and* that it has a discretion

in deciding whether or not to remedy it. This discretion is unknown to our constitutional scheme and history, and is productive of great public mischief: with the greatest of respect, courts cannot *choose* to decide that they would rather not, all things considered, remedy unconstitutional discrimination, when it has been brought to them by individuals directly impacted by said discrimination.

X. The majority opinion attempts to justify this abnegation by noting that it is faced with a polycentric dispute, with a "range of policy choices." (**paragraph 118**) It is respectfully submitted that this is not the case.

a. *First*, there is nothing polycentric about a *declaration* that the Petitioners have a right to marry on equal terms under the SMA.

b. *More* than a mere declaration, however, the present petitioners - and indeed, other petitioners before this Court - presented a set of clearly defined, narrowly focused prayers, which asked this Court to reinterpret a categorised *set* of legal provisions in a gender-neutral, or gender-agnostic manner. Rights and obligations *follow* from said reinterpretation, and do not require "a new code," or a "multiplicity of legislative architecture," (sic) as the majority would have it. If the Court concluded that the specific suggestions were unenforceable the logical conclusion could not have been to deny the existence of on account of unpalatable remedies, as has been done by majority in the present case.

Adoption

Y. Finally, it is respectfully submitted that the majority compounds its own error when considering the prohibition upon adoption. Having already held that the existing legal regime amounts to unconstitutional discrimination (but having declined to act upon it), the majority then holds that *because* queer marriages are not recognised (which, by its own admission, is discriminatory), there exists a rational justification to deny to queer couples the right to adopt - as the adoption regulations presuppose the existence of a valid marriage. (**paragraphs 120-135**)

Z. It is respectfully submitted that a distinction *founded* upon an unconstitutional discrimination cannot become valid, on the sole ground that the Court perceives institutional limitations to remedying the underlying discrimination.

AA. The prohibition upon adoption must therefore be considered on its own terms; it is respectfully submitted that for the reasons advanced above, it is unconstitutionally discriminatory. Furthermore, remedying this discrimination *does not* involve the Court in adjudicating a "range of policy choices," or getting into "legislative architecture": as is evident from the dissenting opinion of the Hon'ble Chief Justice, the remedy in the context of *adoption* is a straightforward judicial interpretation. It is respectfully submitted, therefore, that even *on its own terms*, the majority opinion on *adoption* cannot stand.

Conclusion

BB. By way of conclusion, therefore, Petitioners respectfully reiterate the prayers in their original writ petition, reiterate the contentions set out in their annexed written submissions, and respectfully request this Hon'ble Court to:

a. *Declare* that insofar as the SMA *excludes* queer couples from its statutory ambit, solely on grounds of sexual orientation, it is unconstitutional;

b. *Interpret* the provisions in SMA that trigger such exclusion in gender-neutral terms (a list of such provisions has been stated in the original writ petition);

c. *Declare*, therefore, that queer couples have the right to have their marriage solemnised and registered under the SMA;

d. *Make* any other consequential declaration that this Hon'ble Court deems fit;

e. *Declare*, specifically, that queer couples have the right to adopt under the CARA.

5. That under Article 137 of the Constitution of India, read with Order XLVII of the Supreme Court Rules, this Hon'ble Court is vested with powers to review its judgments. It is respectfully submitted that the Impugned Judgment in the present Petition suffers from several errors apparent on the face of the record and, thus, the present Petition is maintainable.

6. The present Review Petition has been filed within the limitation period and, thus, there is no delay in preferring the present Review Petition against the impugned judgement.

7. The Petitioners herein have not filed any other proceeding(s) regarding the subject matter of the present Review Petition before this Hon'ble Court.

PRAYERS

In the circumstances mentioned above, it is most respectfully prayed that this Hon'ble Court be pleased to:

(a) Review the judgement dated 17.10.2023 passed by this Hon'ble Court in Writ Petition (Civil) No. 1011/2022 and connected matters, including Writ Petition (Civil) No. 1142/2022.

(b) Pass such other or further order(s) as this Hon'ble Court may deem fit and proper in the interests of justice.

AND FOR THIS ACT OF KINDNESS, THE PETITIONER, AS DUTY BOUND, SHALL EVER PRAY TO THEIR LORDSHIPS

Drafted By: **Filed By:**

Abhinav Sekhri, Adv.

Gautam Bhatia, Adv.

Hrishika Jain, Adv.

Shadan Farasat, Adv.

Utkarsh Saxena, Adv.

Place: **New Delhi**

Dated: **20th November 2023.**

Mr. Shadan Farasat

Advocate for the petitioners